

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations)
(Auburn, Northport, Tuscaloosa, Camp Hill,)
Gardendale, Homewood, Birmingham, Dadeville,)
Orrville, Goodwater, Pine Level, Jemison, and)
Thomaston. Alabama)

MM Docket No. 01-104
RM-10103
RM-10323
RM-10324

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Chief, Media Bureau

REPLY

1. **Cox** Radio, Inc., and its wholly owned subsidiary CXR Holdings, Inc. (collectively, "**Cox**"), and Radio South, Inc. ("Radio South"), by their attorneys, hereby reply to the "Opposition to Petition for Reconsideration" filed by Preston W. Small in the above-captioned proceeding ("Small Pleading"). As discussed in a separate Motion to Strike filed simultaneously herewith, **Cox** and Radio South urge the Commission to strike the pleading in its entirety because Small is not a party with a legitimate interest in this proceeding and the pleading is irrelevant to a determination in this case. However, if the Commission were to consider the substance of the Small Pleading rather than dismiss it on purely procedural grounds, Cox and Radio South hereby address the points raised therein.

2. The Small Pleading (1) erroneously accuses Radio South and its counsel of violating the Commission's *ex parte* rules, a violation which, even if proved, could make no difference to the outcome of this proceeding; (2) argues that the Commission should not create an exception to a policy that does not even apply in this case; and (3) engages in unsupported speculation regarding a purported relationship between **Cox** and Radio South, or between

WNNX LICO, Inc. ("WNNX") and one or both of Cox and Radio South or between Cox and/or Radio South and Auburn Network, Inc. Each of these arguments is addressed in turn below.

3. First, Small engages in a repetitive, irrelevant, and erroneous discussion regarding a purported *ex parte* violation. It is *repetitive* because Small has raised virtually identical arguments twice before – once in MM Docket No. 98-112, and once in a letter to the FCC's General Counsel.¹ It is *irrelevant* because Small does not state a claim for any relief that can be granted as a result of the alleged violation. Small asks that the Commission dismiss the Petition for Reconsideration, but Small's allegations are directed only towards Radio South and its counsel. Since Cox is a party to the Petition for Reconsideration as well, dismissal is not a remedy that can be granted.³ It is *erroneous* because Small misstates and misapplies the law, as demonstrated by WNNX in response to an earlier version of Small's argument.⁴ The arguments do not need to be re-addressed here because they have absolutely no bearing on the merits of the Petition for Reconsideration or the outcome of this proceeding.

4. Next, Small argues that no exception should be made to the Commission's *Cut and Shoot* policy in this case. Small Pleading at 8-9. Small misses the point entirely, which is that *Cut and Shoot* does not even apply. In *Cut and Shoot* the Commission dismissed a petition for rule making because the proposed allotment was contingent upon the construction of facilities by a third party – a third party who could have elected not to construct and thereby render the proposed allotment invalid. *Cut and Shoot* does not apply to the Cox and Radio South

See Letter from Timothy E. Welch to Jane E. Mago, November 8, 2002; Motion for Leave to Submit Information Concerning an Improper *Ex Parte* Communication, MM Docket No. 98-112 (filed Oct. 30, 2002).

³ In a footnote, Small claims that Cox somehow shares the blame for Radio South's alleged violations, but this claim is unsupported, irresponsible, and potentially libelous. See Small Pleading at 3 n.1.

⁴ See Consolidated Opposition of WNNX LICO, Inc, MM Docket No. 98-112 (filed Nov 8, 2002).

counterproposals because they were not contingent upon **the** actions of a third party. The third party in this case, WNNX, had already completed construction and filed its license application six months prior to the filing of the Cox and Radio South proposals. **Furthermore**, Cox and Radio South did not argue that MM Docket 98-112 is final. Rather they argued that despite the lack of finality, the Cox and Radio South proposals should be granted contingent on the outcome of MM Docket No. 98-112 as had been done with four applications specifically identified in the petition for **reconsideration**. Accordingly, Small's argument with regard to *Cut and Shoot* is irrelevant and immaterial

5. Next, Small engages in an elaborate and totally unsupported speculation in which, again, no claim for relief is stated, and no opposition to **the** Petition for Reconsideration is lodged. **Small Pleading at 9-11**. Small appears to be asking, without knowledge or foundation, whether there is some undisclosed, improper relationship between one or more of Cox, Radio South and WNNX. *See* Small Pleading at 9 ("is there some undisclosed relationship"); **10** ("there must be some agreement"), ("a preexisting contractual relationship between them"); **11** ("purportedly independent companies"). To the extent that Small alleges that an improper relationship exists between Cox and Radio South, or between WNNX or Auburn Network Inc. ("Auburn") (the petitioner in this case) and either or both of them, Cox and Radio South hereby deny those allegations. Specifically, Cox and Radio South have no "preexisting contractual relationship between them" as Small states. *See* Small Pleading at 10. Moreover, Neither Cox nor Radio South had any preexisting relationship with Auburn nor did either "orchestrate" any of **Auburn's** filings. *See id.* With **respect** to WNNX, it is not a party **to this proceeding**, was not served with a copy of the **Small Pleading**, and is not a signatory to this Reply.'

⁵ Although Mark N. Lipp **represents** WNNX in another proceeding, Small did not serve either WNNX or Mr. Lipp in his capacity as counsel to WNNX with a copy of this

6. Finally, Small accuses Radio South and WNNX of “lying to the Commission.” Small Pleading at 8, and Cox, Radio South, and WNNX of “blatant, disqualifying misrepresentations.” Small Pleading 11-13. These astonishing accusations are unsupported, irresponsible, and, indeed, libelous. **As to WNNX**, which is not a party to this proceeding and not a signatory to the Pctition for Reconsideration, Small does not explain how it came to be “lying to the Commission” in a pleading it did not file. Since it is impossible for a party to commit a **lie** in a statement it did not **make**, the accusation that WNNX is “lying to the Commission” is deliberately erroneous, libelous, and **sanctionable**.⁶ This would be a matter to be pursued by either WNNX **or** the Commission on its own motion.⁷

7. **As to Cox and Radio South**, one searches the Small Pleading in vain for the “blatant, disqualifying **misrepresentations**” that Small alleges were made by these parties. The passages quoted by Small, evidently believing they disclose some fatal contradiction, are entirely consistent with one another. Cox and Radio South, with knowledge of Commission precedent and relevant matters pending **before** the Commission, simply request that the Commission treat similarly situated parties in similar fashion, as it is required by law to do. Small’s efforts to turn this into “lying” or “misrepresentations” are *as* phony as his trumped-up *ex parte* claims.

pleading. Indeed, service was made upon Mr. Lipp and Erwin G. Krasnow together, who are counsel only to Radio South.

⁶ Section 1.24 of the Commission’s Rules provides that the Commission may censure, suspend, or disbar any attorney who “is lacking in character or professional integrity.” Section 1.52 provides that the signature of an attorney on a pleading constitutes a **certificate** that he believes there is good ground to support it and that it is not interposed for the purpose of delay. Section 1001 of Title 18 of the U.S. Code provides for criminal **penalties** for making false statements to government agencies.

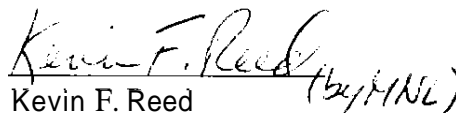
⁷ **As** recited above, WNNX is not a party to this proceeding. Small has leveled false accusations against WNNX without service upon WNNX, which is the **same** behavior he has **complained** of. **Cox** and Radio South **believe** that WNNX, having more restraint than Small, will not likely **become** involved in this proceeding except upon Commission request.

WHEREFORE, ~~the~~ Commission should ~~strike~~ the Opposition to Petition for Reconsideration from the record of this proceeding for the reasons set forth in the Motion to Strike filed simultaneously ~~herewith~~, or in the ~~alternative~~, dismiss that pleading for the reasons set forth ~~hercin~~.

Respectfully submitted,

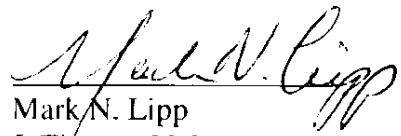
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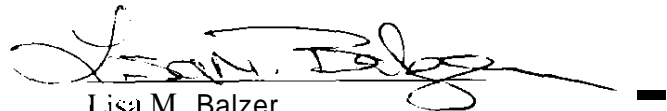
November 21, 2002

CERTIFICATE OF SERVICE

I, Lisa **M. Balzer**, a secretary in the law firm of Shook, Hardy & Bacon L.L.P., do hereby certify **that** on **this 21st** day of November, 2002, **I** have mailed the foregoing **"Reply"** to the following:

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* Delivered by hand